NO. 4146

In the

United States Circuit Court of Appeals

For the Ninth Circuit

C. F. PETERSON,
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error

NO. 4146

Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division

Brief for Defendant in Error

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Brief for Defendant in Error

Statement of the Case

Plaintiff in error, C. F. Peterson, and one Clinton Maelhorn were convicted in the Commissioner's Court for Knik Precinct, Third Division, Territory of Alaska,

before the Court, Hon. W. H. Rager, on August 11, 1922, upon a complaint charging unlawful possession of whiskey commonly called, "white mule," in violation of Section 1 of the Alaska Dry Law, which complaint is as follows:

"In the United States Commissioner's Court for Knik Precinct, Third Division, Territory of Alaska

UNITED STATES OF AMERICA NO.———

vs.

C. F. PETERSON and CLINTON MAELHORN

Complaint for the Violation of Section I, Act of Congress Approved February 14th, 1917, Known as the Alaska Dry Law.

(Filed August 12, 1922.)

C. F. Peterson and Clinton Maelhorn are accused by C. W. Mossman, Deputy United States Marshal for the Third Division of the Territory of Alaska, in this complaint of the crime of having intoxicating liquor in their possession, committed as follows:

The said C. F. Peterson and Clinton Maelhorn, on the 20th day of July, A. D. 1922, in Knik Precinct, in the Territory of Alaska and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully have in their possession intoxicating liquor, to wit, whiskey, commonly called "white mule," in violation of the provisions of the Act of Congress, approved February 14th, 1917, commonly known as the Alaska Dry Law, contrary to the

form of the statutes in such case made and provided, and against the peace and dignity of the United States of America.

C. W. MOSSMAN.

United States of America,

Territory of Alaska, ss.

I, C. W. Mossman, being first duly sworn, upon oath depose and say that the foregoing complaint is true; and that I am a Deputy United States Marshal for the Third Division of the Territory of Alaska.

C. W. MOSSMAN.

Subscribed and sworn to before me this 24th day of July, 1922.

(Seal) W. H. RAGER,

U. S. Commissioner and Ex-Officio Justice of the Peace."

The appellant was sentenced in the Justice Court to nine months in jail and to pay a fine of $900.00, and Maelhorn received the same sentence both as to imprisonment and fine. Both appealed to the District Court for the Territory of Alaska, Third Division, and were admitted to bail in the sum of $2000.00, each. In said District Court both defendants were again convicted by a jury trial on December 7, 1922. Peterson was sentenced to serve a term of nine months in the Federal jail at Anchorage and to pay a fine of $900.00 and he prosecutes this Writ of Error

against said judgment. Maelhorn submitted to the judgment of the court and does not appeal.

Appellant in his Assignment of Errors relies upon fourteen assignments of error, numbered from 1 to 14. There is apparently a misprint or typographical error on Record page 77 at the bottom thereof regarding assignment No. 13 and by reference to the Assignment of Errors the same assigns error on Motion in Arrest of Judgment.

The errors assigned may be classified under three heads with subdivisions.

1. Jurisdiction of the Court.

   (a) Sufficiency of the complaint.

   (b) Whether crime charged is infamous and indictment required.

   (c) Constitutionality or legality of the Alaska Dry Law.

2. Error in Admission of Evidence.

   (a) Admissability of liquor without search warrant.

   (b) Admisability of statements by defendant while under arrest.

   (c) Admisability of testimony concerning ownership of automobile.

3. Sufficiency of Evidence.

This brief is based upon the assignments of error and not upon the points of appellant's brief for the reason that the same has not yet been served. It is now the 8th day of February, and it will be impossible to await the service of such brief, which could not arrive for at least another week by the mails. The United States Attorney is required to be present in this court at San Francisco on March 5th. It will, therefore, be seen that to await the service of appellant's brief the government would not have sufficient time by any means to prepare brief, have it printed, make the journey to San Francisco and file the same three days before the case is called for argument, under the rule. Hence, as before stated, the reason for basing this brief upon all the assignments of error of appellant.

POINTS AND AUTHORITIES

Authority or right of any person other than officer to make complaint.

People vs. Stickle, (Mich) 121 NW 497.
16 Corpus Juris, Page 289, Sec. 497.
State vs. Howard (NH) 43 Atl. 592.
United States vs. Skinner, 27 Fed. Cas. No. 16,309.
State vs. Giles (Maine) 64 Atl. 619.
Com. vs. Murphy, (Mass.) 18 NE 418.

Com. vs. Alden (Mass.) 9 NE 15.
State vs. Woodmanse, (R. I.) 35 Atl. 961.
Wooten vs. State, (Tex) 121 SW 703.

A person convicted of violating the Alaska Dry Law, an Act of Congress approved February 14, 1917, cannot (1) be imprisoned in the penitentiary nor at hard labor; cannot (2) be imprisoned for a longer term than one year on a single charge; therefore (3) the offense is a misdemeanor, and can (4) be prosecuted under an information or complaint, as well as by indictment of a Grand Jury.

(1) **Alaska Dry Law,** Sections 1, 24, etc.
In Re Mills, 135 U. S. 263.
In Re Bonner, 151 U. S. 242.
Horner vs. State, 1 Oreg. 267.
Brooks vs. People, 24 Pac. 553 (Col.)

(2) **Alaska Dry Law, Sections 1, 24, etc.**
Ex Parte Jackson, 96 U. S. 727.
In Re MacDonald, 33 Pac. 20 (Wyo.)—distinguishing Ex Parte Rosenheim, 23 Pac. 372 (Cal.)
State vs. Baxter 21 Pac. 650 (Kan.)—citing in Re Boyd, 9 Pac. 240.
Ex Parte McGee, 54 Pac. 1091 (Oreg.)
In Re Newton, 58 N. W. 436 (Neb.)
Ex Parte Bryant, 4 S. 854 (Fla.)
Bailey vs. State, 6 S. 398 (Ala.)
Ex Parte Bolling, 31 Ill. 96
Davis vs. State, 22 Ga. 101.

(3) Alaska Dry Law, Sections 1, etc.

Compiled Laws of Alaska, 1913, Section 2065.
Act of March 4, 1909, C. 321, Sec. 336, 35 Stat. 1152; Barnes Federal Code, Sec. 10,038.

(4) Alaska Dry Law, Sections 18 and 28.

U. S. vs. Powers and Robertson, 1 Alaska 180, and cases cited on page 184.
John H. Breede vs. James M. Powers, U. S. Marshal, Sup. Ct. No. 45—Oct. Term, 1923 (Unreported to date).
Young vs. U. S. 272 Fed. 967 (9th Cir.)
U. S. vs. Achen, 267 Fed. 595 (E. D., N. Y.)
U. S. vs. Quaritus, 267 Fed. 227.
U. S. vs. Metzgar, 270 Fed. 291.

The Congress of the United States has authority to pass legislation making the possession of intoxicating liquor a crime, and the Alaska Dry Law is valid.

Binns vs. United States, 194 U. S. 490-1.
Street vs. Lincoln Safe Deposit Co. (S. D. N. Y.) 267 Fed. 706—See also same in 254 U. S. 88.
Rose vs. U. S. (6th Cir.) 274 Fed. 245.
U. S. vs. Murphy, (E. D. N. Y.) 264 Fed. 842.
Massey vs. U. S. (8th Cir.) 281 Fed. 293.
Page vs. U. S. (9th Cir.) 278 Fed. 41.
Jacob Ruppert vs. Caffey, 251 U. S. 264.
Abbate vs. U. S. (9th Cir.) 270 Fed. 735.
Simms vs. Simms, 175 U. S. 168.
Mormon Church vs. United States, 136 U. S. 1-42.
National Bank vs. County of Yankton, 101 U. S. 129-132.
Koppitz vs. United States, 272 Fed. 96.

The complaint under which defendant was convicted states facts sufficient to constitute a crime.

Cabiale vs. U. S. (9th Cir.) 276 Fed. 769, see par. 2.
Young vs. U. S. (9th Cir.) 272 Fed. 967.
Massey vs. U. S. (8th Cir.) 281 Fed. 293.
Heitler vs. U. S. (7th Cir.) 280 Fed. 703.
Strada vs. U. S. (9th Cir.) 281 Fed. 143.
Laurie vs. U. S. (6th Cir.) 278 Fed. 934.
Feigin vs U. S. (9th Cir.) 279 Fed. 107.
U. S. vs. Everson (S. D. Fla.) 280 Fed. 126, distinguishing Dowling case
Vesely vs. U. S. (9th Cir.) 275 Fed. 693.
Millich et al. vs. U. S. (9th Cir.) 282 Fed. 604.
Herine vs. U. S. (9th Cir.) 276 Fed. 806.
Kathriner vs. U. S. (9th Cir.) 276 Fed. 808.

A search warrant is unnecessary to search an automobile, boat or other vehicle where the officer making the search has reasonable grounds to believe that contraband intoxicating liquors are being carried therein.

Lambert vs. U. S. 282 Fed. 413 (9th Cir.)
U. S. vs. Bateman, 278 Fed. 231 (S. D. Cal., N. D.)
U. S. vs. Fenton, 268 Fed. 221 (D. Mont.)
Boyd vs. U. S., 286 Fed. 930 (4th Cir.)
Bell vs. U. S., 285 Fed. 145 (5th Cir.)
McBride vs. U. S., 284 Fed. 416 (5th Cir.)
U. S. vs. Rembert, 284 Fed. 996 (S. D. Tex.)
Houck vs. State, 140 N. E. 112 (Ohio).
Elrod vs. Moss, 278 Fed. 123 (4th Cir.)
Vachina vs. U. S., 283 Fed. 25 (9th Cir.)

U. S. vs. Snyder, 278 Fed. 650 (N. D., W. Va.)
O'Connor vs. U. S., 281 Fed. 396 (D., N. J.)
U. S. vs. Vatune, 292 Fed. 497 (N. D. Cal., S. D.)
Ex Parte Morrill, 35 Fed. 261 (Cir. Ct. Oreg.)
U. S. vs. Welsh, 247 Fed. 239 (S. D., N. Y.)

Statements and conversations made to a Deputy U. S. Marshal or other officer, either before or after arrest, which were voluntary, and not induced by duress, intimidation or other improper influences, are admissable, and the officer may testify to them at the trial.

Perovich vs. U. S., 205 U. S. 86.
Wilson vs. U. S., 162 U. S. 613.
Mangun vs. U. S., 289 Fed. 213 (9th Cir.)
Murray vs. U. S., 288 Fed. 1008 (Ct. of App., D. C.)
Murphy vs. U. S., 285 Fed. 801 (7th Cir.)
Wiggins vs. U. S., (2nd Circuit) 272 Fed. 41.
State vs. Brinkley, 105 Pac. 708 (Oreg.)
State vs. Crowder, 21 Pac. 208 (Kan.) See Par. 2 and cases there cited.

Admissions admitted by trial Judge in the exercise of his discretion will not be disturbed unless there is apparent and manifest error.

Rogoway vs. State, 78 Pac. 987.
State vs. Humphrey et al 128 Pac. 824 (Oreg.)
State vs. Morris, 163 Pac. 567 (Oreg.) See par. 5-6.
Mangum vs. U. S. 289 Fed. 213 (9th Cir.)

The Court, in the instructions to the jury, correctly stated the law of "possession"; there was "substantial" evidence that defendant was the possessor of the intoxicating liquor; the weight of the evidence is for the jury, and Appellate Courts will not disturb the verdict.

Compiled Laws of Alaska, 1913, Sec. 2266.
Rev. St. Sec. 1011, Comp. St., Sec. 1672.
Page et al vs. U. S. (9th Cir.) 278 Fed. 41.
Rose vs. U. S. (6th Cir.) 274 Fed. 245.
Waddel vs. U. S. (8th Cir.) 283 Fed. 409.
Laurie vs. U. S., 278 Fed. 934 (6th Cir.)
Penn Casualty Company vs. Whiteway et al, 210 Fed. 782 (9th Cir.)

ARGUMENT

(a) Appellant questions the sufficiency of the complaint in this case on the ground that C. W. Mossman does not sign the complaint in an official capacity. In the first place we think the contention is without merit for he has made the complaint as deputy marshal. In the very first paragraph (Record page 6) defendants are accused "by C. W. Mossman, Deputy United States Marshal for the Third Division for the Territory of Alaska." This is repeated in the verification, but assuming that he has not sufficiently

described himself, he has the same right as any other person to make complaint. Section 27 of the Alaska Dry Law makes it the duty of certain officials to enforce the Act, among them, of course, marshals and deputies, but nowhere can it be shown that they are given exclusive jurisdiction of making complaints, and unless they are given exclusive jurisdiction, anyone can make a complaint.

16 Corpus Juris, Page 289, Sec. 497, states that the rule that complaints may be made by any person is of long standing and further, on page 290 in the same section is the following language:

"But the mere fact that certain officers are authorized to make complaint does not necessarily give them the exclusive right to do so."

In People vs. Stickle, Mich. 121 N. W. 498, a well considered case where defendant was convicted of wife desertion, it is contended that only the Superintendent of the poor could make the complaint, the court said:

"And the rule that one who is a competent witness and has knowledge of the facts may make complaint in a criminal case, permits the wife to be the complaining witness in this case. No good reason has been suggested for holding that because a superintendent of the poor or a county agent may make the com-

plaint, it was intended to give them the exclusive right to initiate proceedings."

In State vs. Howard N. H. 43 (Atla.) 592, where defendant was charged with keeping a dog without a license in violation of a State Law, wherein the Mayor of each City and the selectmen of each town are required to make complaint against owners or keepers, it was contended that no other persons could make complaints, that the court held:

"Any person may make a complaint under Section 8 or kill an unlicensed dog under Section 11, but it is a special duty of the officers to whom warrants have been issued to do both and again it is the general policy of the laws that any person who has probable cause for believing that another has committed a crime shall be at liberty to make complaint against the defendant."

For these reasons, that the complaint does show the signature of the officer, also that anyone can sign the complaint who knows the facts, we contend that the proposition is entirely without merit.

Under assignment 1, 4th subdivision, appellant contends that the complaint does not state facts sufficient to constitute a cause of action. No defect is pointed out and, as stated before, this brief is being prepared upon the assignments of error alone and not upon appellant's brief.

Attention is called to the fact that this case is prosecuted under the Alaska Bone Dry Law, the first section of which declares:

"That on and after the first day of January, nineteen hundred and eighteen it shall be unlawful for any person * * * to have in his or its possession or to transport any intoxicating liquor unless the same was procured and is so possessed and transported as hereinafter provided."

Another paragraph of the same section of the Act provides that the term liquor as used in this Act shall include whiskey, which the complaint in this case does; (Record page 6).

Section 18 of the Act declares:

"That it shall not be necessary in order to convict any person * * * of manufacturing, importing or selling alcoholic liquors to prove the actual manufacture, importing, sale, delivery of, or payment for any alcoholic liquors, but the evidence of having or keeping them in hand, stored or deposited, taking orders for, or offering to sell or barter, or exchanging them for goods or merchandise, or giving them away, shall be sufficient to convict."

In Millich vs. United States, 282 Fed. 604, the case on appeal from the District Court of Alaska before this court, the count of the charge in regard to possession was in part that the defendants did, "in and on the premises known as Alaskan Cafe, adjoining the Alaskan Hotel on the west, and being on the north

side of Front Street, then and there knowingly, willfully, and unlawfully have in their possession certain intoxicating liquor, to wit, whiskey containing more than one-half of one per centum of alcohol by volume, the exact amount of said whiskey being unknown to the grand jurors."

This count, together with others of the indictment, was sustained against demurrer by this court and it will be noticed that the language is practically the same as that used in the complaint at bar, save that the specific premises where possession was had was not described, but the evidence shows that the possession was in an automobile, but such possession was charged to be in Knik Precinct, Territory of Alaska, which we believe sufficient.

(b) The Alaska Dry Law in Section I and all other parts of the Act specifically states that a violation of the provisions of the Act is a misdemeanor and in Section 28, which provides the machinery for prosecutions of violations of the Act, we find the following:

"Section 28. That prosecutions for violations of the provisions of this Act shall be on information filed by any such officer before any justice of the peace or district judge, or upon indictment by any grand jury of the Territory of Alaska, and said United States district attorney or his deputy shall file such information upon the presentation to him or his assistants of sworn information that the law has been violated;

and in such prosecutions anyone making a false oath to any material fact shall be deemed guilty of perjury."

It seems, in view of the above provision and the long line of decisions interpreting statutes whose terminology is similar to that found in the Alaska Dry Law, that there is no doubt about the class of offense committed by a violation of the provisions of the Act, nor about the method of prosecuting such offenses. But plaintiff in error contends that error was committed in that he was tried under a criminal information and not by an indictment returned by a Grand Jury. The Supreme Court of the United States has long held that one convicted of a crime cannot be imprisoned in the penitentiary nor at hard labor unless the Act under which the prosecution is had specifically provides and authorizes that manner of imprisonment. This principle was laid down in the case of In Re Mills, 135 U. S. 263, where the court, page 270, says:

"A sentence simply of 'imprisonment' in the case of a person convicted of an offense against the United States—where the statute prescribing the punishment does not require that the accused shall be confined in the penitentiary—cannot be executed by confinement in a penitentiary, except in cases in which the sentence is for a period longer than one year."

In the case of In Re Bonner, 151 U. S. 242, this principle is again laid down and In Re Mills cited with approval. On pages 254 and 255, the Court says:

"It follows that the court had no jurisdiction to order an imprisonment, when the place is not specified in the law, to be executed in a penitentiary when the imprisonment is not ordered for a period of longer than one year at hard labor."

Section 2065, Compiled Laws of Alaska, 1913, defines a misdemeanor as a crime not punishable by death or by imprisonment in the penitentiary, and Section 336, Chap. 321 of the Act of March 4, 1909, (35 Stat. 1152) is to the same effect in that it defines a misdemeanor as a crime not punishable by death nor by imprisonment for a term exceeding one year, the statute reading as follows:

"All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

Indeed it seems to be the contention of plaintiff in error that a violation of the provisions of the Alaska Dry Law constitutes a felony or infamous crime, and, therefore, that the offender may be prosecuted only by the indictment of a grand jury, on the ground

that imprisonment under the Alaska Dry Law may be for a period exceeding one year. But the Act itself specifically and clearly states otherwise. Nowhere throughout the Act is a penalty of imprisonment for more than one year provided. So that appellant's contention seems to rest upon the supposition that where a sentence of imprisonment in jail for a term of one year is administered, and in addition to that a fine is assessed, that the total term of imprisonment might be more than a year in case the defendant should be imprisoned for the purpose of collecting the fine.

The courts of the United States have held uniformly in a long line of decisions that imprisonment because of non-payment of a fine is merely a method of enforcing the payment of the fine and constitutes no part of the penalty administered for the violation of the law.

In Ex Parte McGee, 54, Pac. 1091, the Supreme Court of Oregon held that imprisonment to enforce the payment of a fine is no part of the penalty itself, stating its decision in the following words:

"The imprisonment is merely a prescribed mode of enforcing the payment of the fine, and, as we have seen, constitutes a step in the code of criminal procedure to be pursued in all cases involving the im-

position of a fine. The punishment permitted by the charter and fixed by the ordinance is imprisonment or fine, or both. All beyond is mere mode or manner of enforcement. The first can only be satisfied by serving out the prescribed term in prison, while the latter may be satisfied by payment of the fine imposed; but for the coercion of that payment the statute has prescribed a mode of procedure, which is to commit the accused to prison for a term not exceeding one day for every two dollars of the fine. The mode and manner of enforcing the punishment should not be confounded with the punishment itself, or regarded as a part of it.''

In a case brought under the National Prohibition Act this Court, in Young vs. United States, 272 Fed. 967, held that the offense charged was a misdemeanor and was rightfully prosecuted by information, holding that this is the established law of the Federal jurisdiction. And since then the Supreme Court of the United States in the case of John H. Brede vs. James M. Powers, decided, on October 22, 1923, No. 45, October Term, 1923, (not reported to date) that prosecutions under the National Prohibition Act may be brought by information, since the offense is not infamous, and since the Act itself authorizes prosecution by information.

It will be noticed that in the Brede case an offense under the National Prohibition Act was involved. Under that Act the punishment may, under some condi-

tions be imprisonment up to a period of five years.

The case at bar involves an offense under the Alaska Dry Law, which does not authorize imprisonment in a penitentiary nor at hard labor, and the Alaska Dry Law differs from the National Prohibition Act in respect to the length of possible imprisonment by making one year the maximum. This, it seems to us, brings the case at bar squarely within all the decisions holding that offenses under similar acts may be prosecuted by information.

(c) Constitutionality or Legality of the Alaska Dry Law.

Appellant in his first assignment of error claims Congress is without authority to pass legislation making the possession of intoxicating liquor an offene. This matter we think has been disposed of by this court, but we desire to call the attention of the court to the case of Binns vs. United States, 194 U. S. 490-1, as follows:

> "It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories."

This is a case arising under the Act of Congress

imposing trade licenses on certain businesses from Alaska.

In Simms vs. Simms, 175 U. S. 168, involving an action for divorce for want of jurisdiction, the court said:

"In the Territories of the United States, Congress has the entire dominion and sovereignty, national, and local, Feleral and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state."

In Mormon Church vs. United States, 136 U. S. 1-42, involving the abrogation of charter of the Mormon Church under Act of Congress, the court said:

"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States."

National Bank vs. County of Yankton, 101 U. S., 129-132, involving the right of counties and townships under a Dakota Territorial Act to vote bonds. The court said:

"Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organizations."

In the case of Abbate vs. United States, 270 Fed. 275, this court held the Bone Dry Law in force in the Territory of Alaska, the court saying:

"In enacting the Bone Dry Law * * * Congress was pursuing its policy of prohibition in Indian Territory."

In Koppitz vs. United States, 272 Fed. 96, this court again upheld the Alaska Bone Dry Law and declared it in force.

As shown by the foregoing cases and many others Congress has plenary power to legislate upon all matters of government for a territory. If the contention be that they have not, then who has? Many territories and in fact almost all of them have been governed by congressional legislation for years after their acquisition and no legislature organized or authorized. If they did not have authority over this subject, then it would exist nowhere because Congress is the sole repository of legislative power in Territories. Certainly the organization of the legislature under Congressional law would not change the matter for the legislature derives no authority except that conferred by Congress.

As to constitutionality of such legislation, the foregoing cases show that this power has been settled and legislated upon by Congress for many years.

We therefore think the contention is without merit.

ADDENDUM

Since the preparation of this brief and after the same is in the hands of the printers the following information was received by wire from attorney for Plaintiff in Error:

"Will contend both cases: amendment National Prohibition Act November twenty-three, Nineteen Twenty One, supersedes Alaska Bone Dry Law."

The phrase "both cases" above evidently refers to this case and to case No. 4147, also before this court, by the same appellant. The Amendment to the National Prohibition Act, approved November 23, 1921, is the "Act Supplemental to the National Prohibition Act," commonly called the Anti-Beer Bill.

It is hard to see on what grounds it can be claimed that the Act Supplemental to the National Prohibition Act supersedes the Alaska Dry Law. Section I of the Amendment is a section of definitions. Section 2 of the Amendment provides that only spirituous and vinuous liquors may be prescribed for medicinal purposes, and relates to the conditions under which such may be shipped into the United States for non-beverage purposes. Section 3 applies the Amendment and the National Prohibition Act to the Territories, specifically mentioning Hawaii and the Virgin Islands, and

confers jurisdiction on their courts. Section 4 grants authority to the commissioner to formulate regulations to make the Amendment effective. Section 5 provides that all laws relating to the regulation and taxation of the traffic in intoxicating liquors that were existent at the time the National Prohibition Act was enacted shall continue in force and effect—unless the same are directly in conflict with that act or with the Amendment. Section 6 provides penalties for illegal searches in certain cases, etc.

Since the Alaska Dry Law itself provided only for the use of "pure alcohol" for "scientific, artistic or mechanical purposes or for compounding or preparing medicines," (Sections 2, 3, 4, 5, 6, 7, 10, 11, 12, Alaska Dry Law) and "wine for sacramental purposes," (Sections 8 and 9, Alaska Dry Law) and, hence, by its terms, exclusions and prohibitions made prescribing beer for medicinal purposes illegal, it is quite evident that the principal purpose of the Supplemental Act can have no repealing effect on the Alaska Dry Law.

If, by some stretch of imagination, Section 3 of the Amendment is claimed to effect the validity of the Alaska Dry Law, we contend that the answer is obvious. It has never been questioned that the National Prohibition Act applied to Alaska. It was con-

tended in Abbate vs. U. S., 270 Fed. 735, and in Koppitz vs. U. S., 272 Fed. 96, that the Alaska Dry Law was repealed by the National Prohibition Act, but it was never maintained that the National Act did not apply to the Territory of Alaska. This court in deciding those two cases not only held that the Alaska Dry Law was not repealed by the National Prohibition Act and is, therefore, still in effect, but held distinctly that **both** laws are in effect in Alaska. So that Section 3 of the Act Supplemental to the National Prohibition Act in specifically applying the Volstead Act to Hawaii and the Virgin Islands and "all territory subject to its (the United States') jurisdiction" could not possibly bring the Alaska Dry Law and the National Prohibition Act into any new relationship or conflict whereby the Alaska Dry Law is superseded by the latter.

Section 5 of the Amendment was passed specifically for the purpose of providing that certain laws were NOT REPEALED by the National Prohibition Act and has reference especially to certain Internal Revenue Laws which some of the courts had held were repealed by the National Prohibition Act. The Alaska Dry Law contained no such tax provisions, hence no new construction is needed on that score.

Section 6 provides penalties for searching a private

dwelling without a warrant, making malicious searches, and for impersonating an officer of the United States. If there were anything in the Alaska Dry Law contrary to that provision, the repealing effect of the Amendment would, under the holding of this court in Abbate vs. United States, supra, extend only to the inconsistency or direct conflict. But we hold that there is absolutely no conflict or inconsistency.

Certainly Sections 1 and 4 cannot be claimed to have any repealing effect on the Alaska Dry Law, hence we contend that appellant's contention is entirely without merit.

II.

(a) Error in Admission of Evidence.

Admissability of liquor without search.

Error is assigned upon the action of the trial court in admitting the liquor which had been seized, in evidence, without a search warrant and allowing the witness to testify regarding same. The claim is urged under the fourth and fifth amendments to the constitution. As the court well knows the question to be determined is whether the search is an unreasonable one. There is no guarantee in either the fourth or fifth amendments against searches of vehicles, either reasonable or unreasonable, the protection afforded be-

ing given to persons and houses, papers and effects. It was for the court below and for this court here to determine whether the search was an unreasonable one in view of all the facts and evidence. The evidence shows that the officers in an automobile met Peterson and Maelhorn in an automobile in the day time in a narrow road within Anchorage townsite (Record page 27, 34 and 41). It was impossible for either car to pass and the officers got out and went up to defendants car and said to Peterson, "what have you got Chauncey?" He said, "I have a load." Looking into the car they saw the kegs (Record pages 28, 29, 35 and 44). Whereupon Peterson was arrested and taken to jail, together with the kegs, there being eight 10-gallon kegs and three 5-gallon kegs filled with whiskey (Record page 31.) It will thus be seen with such a load in the rear end of a car it would be easily visible.

The question, as stated before, is a judicial one as to whether the obtaining of the evidence was reasonable. It will be seen that there was primarily no search as it is unnecessary to search for a thing which is in plain sight. This was the view held by the lower court and is sustained by the following cases decided in the district courts in this circuit and in this court:

Attention of the court is also called to the testimony of the defendant Clinton Maelhorn who was with Peterson at the time (Record page 48, 49, 50 and 51). Maelhorn took the stand on defense and made no claim whatever that the liquor was concealed from sight or secreted, nor did he deny the existence of the liquor nor the possession of same, either for himself or Peterson.

In United States vs. Fenton, 268 Fed. 221, from the District of Montana, which was a charge of transporting in an automobile, the court says:

"An unlawful arrest of an offender does not work a pardon in his behalf, and seizure without process and by force of government property, of which it is entitled to immediate possession, does not entitle the offender to a return of the property, nor to exclusion of its use in evidence against him. The auto and whiskey, by virtue of the National Prohibition Act (41 Stat. 305), were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have."

In Lambert vs. United States, 282 Fed. 413, the

case of transporting in an automobile. In this case the court says:

"The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officer to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant."

In United States vs. Bateman, 278 Fed. 231, where an auto was stopped without a warrant, and on a motion for return of the property seized, the court held:

"It is my opinion, therefore, that it is not unreasonable for a prohibition officer to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, and the finding of the liquor justifies the search."

In United States vs. Vatune, 292 Fed. 492 on motion for return of liquor seized without warrant and to

quash information, the district court for the Northern District of California, S. D., in a well considered case denied the motion. In the above case the defendant was driving along the street with the liquor well concealed in his auto, according to the testimony of the defendant. The government contended that the liquor was in sight. The court, in denying the motion for return of the liquor used the following language:

"The Fourth Amendment affords inviolable protection to the people with respect to 'their persons, houses, papers and effects, against unreasonable searches and seizures.' What is an 'unreasonable' search or seizure is always a judicial question (United States vs. Bateman (D. C.) 278 Fed. 231, 232, and is determinable from a consideration of the circumstances involved. Officers of the government act under legal authority, in pursuance of oath and official station, and it will be presumed, in the absence of countervailing proof, that they have performed their duty—that is, that they have not been guilty, in a given instance, of making an unreasonable search or effecting an unreasonable seizure. The burden of showing the contrary, then, is upon him who contends to the contrary."

We contend that it is apparent from the evidence of the government that kegs of whiskey were in plain sight of the officers and they were justified in seizing it, being a crime committed in their presence.

If it is contended by appellant that by concealing li-

quor in an automobile an officer is not justified in seizing same when he sees it, then indeed the enforcement of the liquor law is exceedingly difficult, if not impossible, so far as transportation is concerned. It would appear that where an officer under the like circumstance of this case meets another in a road where passage is difficult and he sees the liquor in the automobile, he would be derelict not to seize it, and would fail to perform his duty. We think the contention of defendant should not prevail.

The court's attention is directd to the fact that this is a prosecution, not under the Volstead Act, but under the Alaska Bone Dry Law. The attention of the court is further invited to the fact that the record fails to disclose any petition for the return of the liquor made either before or at the time of trial and it is our contention that the objection, if valid, came too late, since the court will not turn aside from the trial of a case to inquire into a collateral issue.

(b) Error is assigned because the court allowed the witness Mossman to testify concerning statements made by the defendants Peterson and Maelhorn (Record pages 37, 38, 39 and 29). The witness testified in substance that when he first approached the defendant's car he asked, "what have you got Chauncey," in reply to which the defendant stated, "I have

a load." The defendant was not at that time under arrest (Record page 29). Later and during the trip from the place of arrest to the jail the defendant Maelhorn, according to the testimony of the witness Mossman jocularly remarked (Record page 39) that "people who played with fire get burnt." Attention is called to the fact that this testimony was by the defendant Maelhorn and in no way bound the appellant and did not refer to the appellant directly, and we contend, not indirectly. But assuming that the statement referred to included Peterson we maintain that its admission was proper and not error.

In the case of Perovich vs. United States, 205 U. S. 91, passing upon the same question in a homicide case, the court says:

"Again, it is alleged that there was error in overruling a motion made by defendant to strike out all the testimony given by a deputy marshal of conversations between him and the defendant. As these conversations were not induced by duress, intimidation or other improper influences, but were perfectly voluntary, there is no reason why they should not have been received."

In Wilson vs. United States, 162 U. S. 623, also a homicide case this question was considered at much greater length than in the case quoted above, and the same conclusion reached, the court saying:

"In the case at bar defendant was not put under oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. Nor did defendant when testifying on his own behalf testify to the contrary. He testified merely that the commissioner examined him 'without giving him the benefit of counsel or warning him of his right of being represented by counsel, or in any way informing him of his right of being represented by counsel, or in any way informing him of his right to be thus represented.' He did not testify that he did not know that he had a right to be thus represented.' He did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. It is true that, while he was not sworn, he made the statements before a commissioner who was investigating a charge against him, as he was informed; he was in custody but not in irons; there had been threats of mobbing him the night before the examination; he did not have the aid of counsel; and he was not warned that the statement might be used against him or advised that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law."

Mangum vs. United States, 289 Fed. 213 is a case decided by this court, the principle question under

consideration being the admisability of statements made by the defendant. The rule laid down is the same as was announced in the preceding cases, but in addition to that we desire to call the court's attention to the following statement:

"But where on the trial of a criminal case a confession of the defendant is offered in evidence it becomes necessary for the trial court to ascertain and determine as a preliminary question of fact, whether it was freely and voluntarily made, and whether the previous undue influence, if any, had ceased to operate upon the mind of the defendant. In doing so, the court is necessarily vested with a very large discretion, which will not be disturbed on appeal, unless a clear abuse thereof is shown. State vs. Rogoway, 45 Or. 601, 78 Pac. 987, 81 Pac. 234, 2 Ann. Cas. 431; State vs. Squires, 48 N. H. 364."

The evidence in the case at bar shows conclusively that the statements admitted in testimony were voluntarily made by the defendants and that no duress, intimidation or promises were in any way responsible for them. We therefore contend that the objection to their admission was entirely without merit.

(c) Admisability of testimony concerning ownership of automobile.

The third assignment of error goes to the testimony of the witness Mossman in regard to the ownership of the automobile. Defendant objected to such testimony

on the ground that it called for a conclusion. This the court overruled, stating that witness might answer if he knew (Record page 29). The testimony in question called for a statement of fact and was admissable. The court's attention is directed to the statement of witness Watson (Record page 37) in which the same question was put to this witness and no objection made to its admisability on the ground raised in the third assignment of error. It is our contention that the objection to the testimony is without merit and the testimony itself admisable as being evidence on material question of fact.

III.

Sufficiency of Evidence.

Defendant in his twelfth assignment, claims error because the court refused to direct a verdict of not guilty in favor of defendants on the ground that the evidence was insufficient. Attention is called to the fact that eight 10-gallon and three 5-gallon kegs of whiskey were found in possession of defendant (Record page 31, 35); that the kegs contained whiskey, none of which facts appellant's co-defendant, Maelhorn, who took the stand, attempted to deny. The court below, having heard the case and the motion

in arrest of judgment and knowing the evidence, refused either to direct a verdict or to arrest judgment. The evidence being brief, covering but a few pages, it is quickly read and we believe shows conclusively a sufficient foundation upon which to rest the verdict and the judgment.

CONCLUSION

For the reasons above stated we respectfully request this Honorable Court to deny the petition and to sustain the judgment of the lower Court.

Respectfully submitted,

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